

New Hampshire Department of Revenue Administration

Fiscal Note Quick Guide

16-2639

HB 1422-FN, *establishing exemptions from the business profits tax and business enterprise tax for new businesses in New Hampshire.*

House Way & Means Committee

The proposed bill provides for a 10 year tax exemption from the Business Profits Tax and Business Enterprise Tax to any business organization which begins conducting new business activity in New Hampshire.

To qualify for the exemption the business organization must be registered with the Secretary of State as a corporation, LLC, LLP, or LP, be a newly formed or organized business conducting business activity in New Hampshire, employ a minimum of 4 employees for which it pays unemployment tax to the state of New Hampshire, demonstrate corporate good citizenship and contribution to the economy and the community, establish a hiring preference for NH residents, and partner with local colleges to offer internships.

A business organization may also qualify if the business organization was formerly domiciled in the State of NH and has since relocated back to NH and has not been subject to NH Business Taxes for a period of three years. A NH business entity that creates a new branch with a different sector than its other entities and does not reduce staffing to its original entities due to the newly established business would also qualify for the exemption to the business taxes.

There is no way for the Department of Revenue Administration (DRA) to determine the fiscal impact of this bill. The DRA has no way of estimating the number of business organizations that will move to NH in the future or the amount of business taxes they would be exempted from paying if this bill went into effect.

This bill would take effect on January 1, 2017.

The proposed bill may be vulnerable to constitutional challenge. NH case law provides that “[d]istinctions in tax treatment must rest upon reasonable classifications of property, not upon classifications of taxpayers owning a common class of property.” Opinion of Justices, 132 N.H. 777 (1990) citing Opinion of Justices, 115 N.H. 306 (1975). Specifically, not all business organization types can qualify for the proposed tax exemption, only a corporation, LLC, LLP or LP can qualify. Additionally, a taxpayer could argue that providing the tax credit to only “newly formed or organized” businesses improperly classifies taxpayers. The proposed bill also appears to classify taxpayers based on the number of employees employed by the business entity.

The requirement that the taxpayer establish a documented hiring preference for New Hampshire residents may additionally be subject to challenge under the federal Commerce Clause, which

prohibits state regulation that burdens interstate commerce. See New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988).

The DRA is concerned that the proposed bill specifies criteria for qualification for the tax exemption that is so subjective that the DRA may not be able to administer the statute without additional legislative guidance. Specifically, the proposed bill requires that a taxpayer “demonstrate corporate good citizenship or other evidence of the ability of the new business to contribute to the economy and the community” in order to qualify for the exemption. This would call for some unspecified entity to make a subjective determination.

The proposed bill provides that the exemption shall begin with the quarter in which the number of employees reaches 4. The proposed bill does not outline how a taxpayer will report business taxes to the DRA in a year in which they do not qualify for the exemption for all four quarters.